STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1620

J. Paul Robinson,
Relator,

vs.

University of Minnesota,
Respondent.

Filed September 17, 2018
Affirmed
Reyes, Judge

University of Minnesota Office of
Executive Vice President and Provost

Ryan L. Kaess, Kaess Law, L.L.C., St. Paul, Minnesota; and

James C. W. Bock, Minneapolis, Minnesota (for relator)

Douglas R. Peterson, General Counsel, Timothy J. Pramas, Senior Associate General Counsel, University of Minnesota, Minneapolis, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Hooten, Judge.

U N P U B L I S H E D O P I N I O N

REYES, Judge

In this certiorari appeal, relator argues that respondent University of Minnesota's hearing panel appointed pursuant to the University Conflict Resolution Procedure to conduct an evidentiary hearing (1) violated his constitutional right to a jury trial to grieve

his termination by the University; (2) was biased; (3) applied an incorrect evidentiary standard; (4) relied solely on hearsay evidence; and (5) violated his Fifth Amendment right against self-incrimination. Relator also argues that the University was constitutionally estopped from disciplining relator and that his conduct was consistent with the Minnesota Government Data Practices Act and the University's drug policy. We affirm.

FACTS

Relator J. Paul Robinson had been a head wrestling coach for the University of Minnesota (the university) for over 30 years. In early 2016, relator heard rumors about his student-athletes using and selling drugs; relator asked the wrestling team trainer to conduct drug testing on the entire team. After the drug testing was conducted, relator held a team meeting, told the student-athletes that he knew everything, and asked them to individually come to his office if they needed to tell him about any drugs. Relator promised to keep the student-athletes' confessions confidential and to give them amnesty if they decided to come forward.

After the drug-testing results came out, 12 student-athletes individually came to talk to relator about their use of the drug Xanax, which drug testing could not screen. After these meetings, relator gave a list of these student-athletes to the trainer, but did not disclose what they had told him or the extent of their use and sales of drugs.

A student who did not come to talk to relator filed a complaint with the university. The student alleged in part that relator promised confidentiality and amnesty to student-athletes who came forward, all of which was outside of his authority, and then he took the Xanax pills that the student-athletes turned over to him and disposed of them. The

university suspended relator and appointed an investigator. The investigator met with relator in July 2016, and provided an "anti-*Garrity*" warning, which indicated that relator would not be disciplined or terminated for refusing to provide information. During the meeting, relator did not provide complete answers to the investigator's questions.

In August 2016, the investigator met with relator again. Before this meeting, the investigator gave relator a *Garrity* warning, requiring relator to answer the investigator's questions and promising that relator's answers to the questions would not be used against him in criminal proceedings. During this meeting, relator again did not provide complete answers to the investigator's questions.

In September 2016, the university formally terminated relator for cause based on his misconduct and his failure to cooperate with the university's investigation. Relator filed a petition pursuant to the University Conflict Resolution Procedure (the procedure), alleging that the university failed to establish "just cause" for termination of his employment and therefore breached the employment contract and wrongfully discharged him.

Pursuant to the procedure, three panel members were appointed to hold an evidentiary hearing, which occurred in June 2017. After the hearing, the panel found that relator violated the University of Minnesota Student Code of Conduct, the University of Minnesota Department of Intercollegiate Athletics Student-Athlete Alcohol and Drug Education and Drug Testing Program, and the university's Drug Free University policy (the policy). The panel concluded that relator's petition was unsubstantiated and that the university's decision to terminate him was valid. This certiorari appeal follows.

D E C I S I O N

Our review in certiorari proceedings is limited. *Chronopoulos v. Univ. of Minn.*, 520 N.W.2d 437, 441 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). This court may only question "whether jurisdiction was proper, whether the proceedings were regular and fair, and whether the decisions below were arbitrary, oppressive, unreasonable, fraudulent, made under an incorrect theory of law, or without any evidence to support [them]." *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 49 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994).

I. Relator does not have a right to a jury trial.

Relator first argues that he has a right to a jury trial to grieve his termination by the university. We are not persuaded.

Whether relator has a right to a jury trial is a legal question requiring interpretation and application of the Minnesota Constitution, which we review de novo. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 53 (Minn. 2012).

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." Minn. Const. art. I, § 4. A party is not constitutionally entitled to a trial by jury if a party raising "that same type of action" was not entitled to "a jury trial at the time the Minnesota Constitution was adopted." *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 149 (Minn. 2001). However, the right

to a jury trial is not limited to only those causes of action that existed in 1857.[1] *United Prairie Bank-Mountain Lake*, 813 N.W.2d at 53. To determine whether the right to a jury trial exists, we analyze "current causes of action and pleading practices in the context of the theories of relief" that existed in 1857. *Id.* at 53-54. Thus, we analyze whether *the type of action* is an action at law, for which the constitution guarantees a right to a jury trial, or an action in equity, for which there is no constitutional guarantee to a jury trial. *Olson*, 628 N.W.2d at 149. We also analyze the "nature of the relief" being sought. *United Prairie Bank-Mountain Lake*, 813 N.W.2d at 54. In order to have a right to a jury trial, a plaintiff must seek legal remedies, not equitable remedies. *Id.*

Relator is not entitled to a jury trial because he seeks equitable remedies. Relator requested as remedies either reinstatement as the head wrestling coach or front pay in full of the remaining four years on his employment contract. Under Minnesota caselaw, reinstatement is an equitable remedy. *See Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 273 n.4 (Minn. 2017) ("Indeed, the equitable remedy for improper discharge in other contexts is reinstatement, which is a revival of the employment relationship.")

Although relator is seeking monetary recovery as an alternative remedy to reinstatement, "the mere fact that monetary relief is sought does not automatically create a right to a jury trial." *Olson*, 628 N.W.2d at 154. When the plaintiff seeks both equitable and legal relief as part of a single cause of action, the action is not strictly legal in nature, and neither party is entitled to a jury trial. *Indianhead Truck Line, Inc. v. Hvidsten Transp.*

[1] Minnesota adopted its constitution in 1857. *Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002).

Inc., 268 Minn. 176, 194, 128 N.W.2d 334, 347 (1964). Moreover, front pay is generally considered an equitable remedy rather than legal damages. In *Hukkanen v. Int'l Union of Operating Eng'rs.*, the Eighth Circuit noted that "[t]he calculation of front pay . . . is a matter of equitable relief within the district court's sound discretion." 3 F.3d 281, 286 (8th Cir. 1993). In the context of the federal civil-rights laws, the United States Supreme Court has held that front pay is an equitable remedy like reinstatement. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853-54, 121 S. Ct. 1946, 1952 (2001). Therefore, relator is not entitled to a jury trial in this case.[2]

II. The panel members were not biased.

Relator argues that he was deprived of procedural due process because a biased panel of faculty members, all employed and paid by the university, held the hearing. We disagree.

We construe relator's argument as challenging "whether the proceedings were regular and fair." *See Deli*, 511 N.W.2d at 49. We presume that administrative proceedings are conducted honestly and regularly. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975). In order to overcome this presumption of regularity, the party claiming otherwise has the burden of proving that a decision was made improperly by showing a

[2] Relator also argues that the procedure is unconstitutional because it does not afford him the right to a jury trial. The university argues that the only method available for judicial review of a university's decision is by writ of certiorari to this court, and therefore the district court does not have jurisdiction to conduct a jury trial, and the procedure was constitutional. We need not address this issue because appellant is not entitled to a jury trial even if the district court has jurisdiction. *See Rickert v. State*, 795 N.W.2d 236, 240 (Minn. 2011) ("Generally, we will not address a constitutional issue if there is another basis upon which the case can be decided.")

risk of *actual bias. Kennedy v. L.D.*, 430 N.W.2d 833, 837 (Minn. 1988). "Absent a factual basis establishing the [decisionmaker]'s partiality as to the specific issues . . ., this court cannot conclude that the [agency] breached its clear duty to select a fair and impartial decision-maker . . . ." *Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 563 (Minn. App. 2003).

Relator has not shown a risk of actual bias. Relator bases his argument on the fact that the panel members are all employees of the university without showing a specific factual basis establishing the panel members' partiality. Nothing in the record indicates that the panel members have a pecuniary interest in the outcome or have been the target of personal abuse or criticism from relator. *See Withrow*, 421 U.S. at 47, 95 S. Ct. at 1464 (identifying situations where probability of actual bias on the decisionmaker is too high to be constitutionally tolerable). Moreover, pursuant to the procedure, the panel member who led the hearing was selected from relator's employee group, and relator even had the option to reject that panel member once. Between the two remaining panel members, relator appointed one, and the university appointed the other. Relator fails to show actual bias and overcome the presumption of regularity of the proceeding.

III. The panel applied the correct evidentiary standard.

Relator argues that the panel should have applied the clear-and-convincing-evidence standard instead of the preponderance-of-evidence standard in weighing evidence at the hearing and concluding that relator's termination by the university was valid. Appellant's argument is misguided.

Relator relies on *Deli*, 511 N.W.2d 46, in which this court applied the clear-and-convincing-evidence standard. However, the *Deli* court applied the clear-and-convincing-evidence standard because the applicable procedure in that case mandated that standard. *See Deli*, 511 N.W.2d at 52 ("*Under the Rules*,[3] the university had the burden of proving just cause by clear and convincing evidence." (emphasis added)).

The applicable rule here under the procedure explicitly sets out that "the respondent has the burden of demonstrating, by a *preponderance of information* presented, that the discipline was warranted . . . ." (Emphasis added.) Relator provides no other support for his argument that the clear-and-convincing-evidence standard applies. Therefore, the panel correctly applied the preponderance-of-evidence standard at the hearing.

IV. Substantial evidence supports the panel's findings.

Relator argues that insubstantial evidence supports the panel's findings because they are primarily based on hearsay evidence. We are not persuaded.

A reviewing court may reverse the university's decision if it finds a lack of substantial evidence to support the ruling. *Chronopoulos*, 520 N.W.2d at 441. "Substantial evidence" means "1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than some evidence; 4) more than any evidence; and 5) evidence considered in its entirety." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977) (quotations omitted).

[3] This rule refers to the University of Minnesota Academic Professional and Administrative Personnel Rules of Procedure for Grievance Appeals.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Although hearsay is admissible in administrative proceedings, *Carter v. Olmsted Cty. Hous. & Redev. Auth.*, 574 N.W.2d 725, 731 (Minn. App. 1998), "an administrative agency cannot, at least over objection, rest its findings of fact *solely* upon hearsay evidence which is inadmissible in a judicial proceeding," *In re Expulsion of E.J.W.*, 632 N.W.2d 775, 782 (Minn. App. 2001) (emphasis added) (quotation omitted).

Here, the panel did not rest its findings solely upon hearsay evidence. The panel found in part that relator violated relevant policies by refusing to disclose information to the investigators, being uncooperative with the investigation, and promising student-athletes confidentiality and amnesty for self-reporting. The panel based these findings in part on the investigator's testimony that relator did not answer his questions during the investigation and was not cooperative, and partly on relator's own testimony that he did not disclose information of the students possessing drugs and promised them amnesty. The testimony of the investigator and relator is not hearsay, and is substantial evidence supporting the findings. Therefore, the university did not improperly base its findings solely on hearsay evidence.

V. Relator's Fifth Amendment privilege against self-incrimination was not violated.

Relator asserts that the university violated his Fifth Amendment privilege against self-incrimination by not giving him a proper *Garrity* warning, which we construe as

challenging the regularity and fairness of the proceeding. *See Deli*, 511 N.W.2d at 49. Appellant's argument is without merit.

Whether a witness's Fifth Amendment privilege against self-incrimination is violated is a question of law, which we review de novo. *In re Contempt of Ecklund*, 636 N.W.2d 585, 587 (Minn. App. 2001).

Under the Fifth Amendment to the U.S. Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 620 (1967), the United States Supreme Court held that the "use in subsequent criminal proceedings of statements obtained under threat of removal" from employment violates the Fifth Amendment. As a result, in Minnesota, the employer must give an employee a *Garrity* warning acknowledging that the statements compelled by the employer will not be used in subsequent criminal proceedings but that he is required to cooperate and truthfully answer all questions directed to him. *City of Minneapolis v. Johnson*, 450 N.W.2d 156, 158 (Minn. App. 1990).

Here, although the investigator did not give a proper *Garrity* warning before or during the July 2016 meeting,[4] he remedied it by giving a proper written *Garrity* warning before the August 2016 meeting. Relator read and signed it, but failed to answer questions and cooperate with the investigation as required under the warning. This supports the

[4] The university called the warning that they gave relator in July 2016 an "anti-*Garrity*" warning. However, no caselaw indicates that such a warning exists or is permissible. Therefore, we deem it to be an improper *Garrity* warning.

panel's findings. Therefore, the university did not violate relator's Fifth Amendment privilege against self-incrimination, and the proceeding was regular and fair.

VI. The termination of relator's employment is not barred by the principle of entrapment by estoppel.

Relator argues that, because the university misled relator by providing an improper *Garrity* warning, the termination of relator's employment is barred by entrapment by estoppel. Appellant's argument is unavailing.

Entrapment by estoppel is a "long-established rule that a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct." *State v. McKown*, 475 N.W.2d 63, 68 (Minn. 1991). A party asserting entrapment by estoppel must establish four elements:

> First, there must be "wrongful conduct" on the part of an authorized government agent. Second, the party seeking equitable relief must reasonably rely on the wrongful conduct. Third, the party must incur a unique expenditure in reliance on the wrongful conduct. Finally, the balance of the equities must weigh in favor of estoppel.

Nelson v. Comm'r of Revenue, 822 N.W.2d 654, 660 (Minn. 2012) (quotation omitted).

Here, as noted, although the warning that relator received in July was improper, the university remedied it by giving a proper *Garrity* warning before the August meeting. Therefore, relator failed to establish the first element, and the principle of entrapment by estoppel does not bar the termination of relator's employment.

VII. Relator's conduct is not protected by the Minnesota Government Data Practices Act.

Relator argues that the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. §§ 13.01-.90 (2016), supports his conduct, as the student-athletes' suspected drug possession, use, or sales is "health data," disclosure of which is prohibited under MGDPA. This argument is without merit.

This court reviews a question of statutory interpretation de novo. *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 279 (Minn. 2004). When a statute provides its own definition to a word, this court considers that statutory definition instead of its plain meaning. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 631 (Minn. 2016).

The MGDPA defines "health data" as "data on individuals created, collected, received, or maintained by *the Department of Health, political subdivisions, or statewide systems* relating to the identification, description, prevention, and control of disease or as part of an epidemiologic investigation the commissioner designates as necessary to analyze, describe, or protect the public health." Minn. Stat. § 13.3805, subd. 1(a)(2) (emphasis added). And it classifies "health data" as private data on an individual and prohibits their disclosure. Minn. Stat. § 13.3805, subd. 1(b) (emphasis added).

The student-athletes' suspected drug possession, use, or sale is not "health data" under the MGDPA, section 13.3805, subdivision 1(a)(2), because relator is not the Minnesota Department of Health, a political subdivision, or a statewide system. The MGDPA defines a political subdivision as "any county, statutory or home rule charter city, school district, special district, any town . . . , and any board, commission, district or

authority created pursuant to law, local ordinance or charter provision." Minn. Stat. § 13.02, subd. 11. A statewide system is defined as "any record-keeping system in which government data is collected, stored, disseminated and used by means of a system common to one or more state agencies or more than one of its political subdivisions or any combination of state agencies and political subdivision." Minn. Stat. § 3.02, subd. 18. Therefore, data on student-athletes' possession, use, and sales of drugs collected and maintained by relator is not health data, and the MGDPA is not applicable here.

VIII. Relator's refusal to disclose information is inconsistent with the university's drug-free policy.

Relator argues that his refusal to disclose information on the student-athletes' possession, use, and sale of drugs was not a violation of the policy because he followed the "Safe Harbor provision" of the policy. We disagree.

The Safe Harbor provision of the policy provides that any student having a substance-abuse problem can enter the Safe Harbor program "pending approval of the Review Board." Here, it is undisputed that the Review Board never approved the admittance of the 12 students into the Safe Harbor program. Moreover, the Safe Harbor provision provides for the rights of the students, not the obligations of staff such as relator.

Affirmed.